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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1953

 No. 406

PETE HERNANDEZ,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

 BRIEF IN OPPOSITION

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OPINION BELOW

The opinion below of the Texas Court of Criminal Appeals (R. 91) is reported at 251 S.W. 2d 531. (Tex. Crim. 1952.)

JURISDICTION

As admitted by Petitioner on page 2 of his petition under his statement pertaining to jurisdiction, his petition for rehearing in the Texas Court of Criminal Appeals was denied October 22, 1952. Not counting that date, the 90-day period thereafter ended on January 20, 1953, but petition herein was not filed during that time nor was an extension of time had, but the petition was filed on January 21, 1953. Late filing

denied Petitioner jurisdiction in this matter.

Furthermore, Respondent has not had served on it a printed copy of the petition.

By making this response, Respondent does not waive any rule or requirement with which Petitioner should have heretofore or should now or should hereafter comply.

Respondent submits that this Court should not be required to take cognizance of this matter because same is of no importance beyond its own particular facts and has been correctly decided on adequate state grounds irrespective of any federal questions discussed.

ARGUMENT AND AUTHORITIES

Petitioner far over estimates the evidence in this case and thereupon vainly reaches for conclusions unwarranted by the facts. In the wording of his **Questions Presented**, Petitioner has assumed that he presented what would be considered enough evidence to show systematic exclusion from jury service. The evidence is strongly contrary to such an assumption.

In the hearing on Defendant's Motion to Quash the Indictment and Defendant's Motion to Quash the Jury Panel, some seventy-nine (79) pages of testimony were produced, wherein defendant offered six witnesses and the State of Texas offered seven witnesses, all being subjected to full cross-examination as desired by Counsel.

Much of Petitioner's testimony was about former school procedures and matters not pertinent to this inquiry. His witnesses in no instance showed that any plan had been worked nor purpose pursued

toward keeping those white persons characterized by him as Mexican or Latin American from serving on juries in Jackson County, Texas.

The State produced as witnesses all five members of the Jury Commission who had selected the Grand Jury and Petit Jury panels involved in this inquiry. Each Commissioner positively testified under oath that no discrimination was allowed in selecting the jury lists (R. 57-73). This shows full performance of all legal duties imposed by our law on these Commissioners. They are not shown to have been acting like the Commissioners in the *Cassell case*, 339 U.S. 282 (1949) who were not in that instance fulfilling their duty.

The Respondent, the State of Texas, does not condone discrimination against persons of Latin American origin as to serving on Jury Commissions, grand juries, or Petit juries. The Respondent's position in this case is that the record does not disclose systematic exclusion from jury service of Latin Americans so as to deprive Petitioner of his constitutional right of due process and equal protection of law.

Now, if in picking out 250 men from a list of several thousand, we can get men whose education, varied business experiences, constant contact with the public and clear understanding of human nature will best fit them for service on grand jury or petit jury so as to be impartial in their decisions, yet able to understand the intricacies of various situations presented to them as jurors, as has been done in

Jackson County, Texas, we have done great and good service to this fundamental institution, trial by jury.

The defendant in this case is a white man. The jury was composed of white men. No actual exclusion of the white race or any other race therefrom is shown. No discrimination against the white race or based on race or color is shown.

If we are to divide the white race into small segments such as blondes and brunettes, or redheads and others, or left handers and right handers, or Protestant and Catholic and Jew, or by economic classification, or by Irish origin, German origin, etc., then try and force our State to see that proportional or other representation of each such classification is on each trial and grand jury, we have but so encumbered the jury system as to utterly ruin it and nullify any good which might be expected from it.

No jury could be perfect, except perhaps the particular jury which acquits a man will have that standing in that man's individual views. Any jury which convicts is subject to the censure of the criminal who appeared before it.

Your decision in *Brown v. Allen*, 344 U.S. 470 (1953) has shown that this Honorable Court will not lightly upset State procedure and make forever uncertain and perplexing what rights our courts and jury system have in the administration of justice.

Certainly Petitioner has not shown one iota of discrimination against himself in the matters he tries to urge upon this Court. The jury list was from a source which reasonably reflects a cross-section of the population of Jackson County having upon it men suitable in character and intelligence for that duty, some more capable than others.

We wish to now quote the opinion of the Texas Court of Criminal Appeals rendered in this very case and reported in Vol. 251, S.W. 2d 531:

“OPINION

“Murder is the offense, with punishment assessed at life imprisonment in the penitentiary.

“Appellant is a Mexican, or Latin American. He claims that he was discriminated against upon the trial of this case because members of the Mexican nationality were deliberately, systematically, and wilfully excluded from the grand jury that found and returned the indictment in this case and from the petit jury panel from which was selected the petit jury that tried the case. He sought, for said reasons, to quash the indictment and petit jury panel, claiming he had thereby been deprived of equal protection.”

“The action of the court in overruling the two motions presents the sole question for review.

“In support of his contention, appellant relies upon the so-called rule of exclusion as announced by the Supreme Court of the United States—that is, that the long and continued failure to call members of the Negro race for jury service, where it is shown that members of that race were available and qualified for jury service, grand or petit, constitutes a violation of due

process and equal protection against members of that race.

"The rule appears to have been first announced in *Norris v. Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, and since then followed. See *Smith v. Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84; *Hill v. Texas*, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559; *Cassell v. Texas*, 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839; and *Ross v. Texas*, 341, U. S. 918, 71 S. Ct. 742, 95 L. Ed. 1352."

"Appellant would have the above rule to extend to and apply to members of different nationalities—particularly to Mexicans.

"Much testimony was introduced by which appellant sought to show the systematic exclusion of Mexicans from jury service and that there were members of that nationality qualified and available for such service in Jackson County. The facts proven, however, were of no greater probative force than those stipulated by the state and the appellant, which we quote as follows:

" 'The State will stipulate that for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.'

" 'It is stipulated by counsel for the State and counsel for the defendant that there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.'

“With reference to the petit jury, we quote the following:

“ ‘It is stipulated by counsel for the State and counsel for defendant that there is no person of Mexican or other Latin American descent or blood on the list of talesmen.’

“These stipulations of necessity included the ability to read and speak the English language.

“It was shown that Jackson County had a population of approximately 18,000, 15% of which—a witness estimated as a ‘wild guess’—were Mexicans. The same witness also testified as a ‘rough estimate’ that 6 or 7% of that 15% were freeholders upon the tax rolls of the county. It was shown, also, that the population of Jackson County was composed also of Bohemians, Germans, Anglo-Americans, and Negroes. The relative percentages of these, however, were not estimated.

“It may be said, therefore, that the facts relied upon by the appellant to bring this case within the rule of systematic exclusion are that at the time the grand jury was selected and at the time of the trial of this case there were ‘some male persons of Mexican or Latin American descent in Jackson County’ who possessed the qualifications requisite to service as grand or petit jurors, and that no Mexican had been called for jury service in that county for a period of twenty-five years.

“There is an absence of any testimony here suggesting express or factual discrimination against appellant or other Mexicans in the selection, organization, or empaneling of the grand or petit jury in this case. To sustain his claim of discrimination, appellant relies only upon an application of the rule of exclusion mentioned.

“In so far as this court is concerned, the ques-

tion here presented was determined adversely to appellant's contention in the case of Sanchez v. State, 147 Tex. Cr. R. 436, 181 S. W. 2d 87, where we said:

" 'In the absence of a holding by the Supreme Court of the United States that nationality and race bear the same relation, within the meaning of the constitutional provision (Fourteenth Amendment) mentioned, we shall continue to hold that the statute law of this State furnishes the guide for the selection of juries in the State, and that, in the absence of proof showing express discrimination by administrators of the law, a jury so selected in accordance therewith is valid.' (Parentheses supplied)

"Within our knowledge, no decision of the Supreme Court of the United States has been rendered which would change the conclusion just expressed.

"The validity of laws of this state providing for the selection of grand or petit jurors (Arts. 333-350, C. C. P.) has never been seriously challenged. Indeed, the Supreme Court of the United States, in *Smith v. Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, recognized the validity thereof when it said:

" 'Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever.'

"It was with this statement in mind that we said, in effect, that, in the absence of express discrimination, a jury, grand or petit, drawn in accordance with the statute law of this state was valid.

"Appellant challenges the correctness of our conclusion and charges that by such holding we

have extended special benefits to members of the Negro race which are denied to Mexicans, thereby violating equal protection to them. Such contention calls, of necessity, for a construction of the equal protection clause of the Fourteenth Amendment to the Federal Constitution with reference to the selection of juries in state court trials and the decisions of the Supreme Court of the United States relative thereto.

"The Fourteenth Amendment to the Federal Constitution in relation to equal protection¹ was adopted to secure to members of the Negro race, then recently emancipated, the full enjoyment of their freedom. *Nixon v. Herndon*, 273 U. S. 536, 71 L. 579, 47 S. Ct. 446; *Buchanan v. Warley*, 245 U. S. 60, 62 L. Ed. 149, 38 S. Ct. 16; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664; *Slaughter-House cases*, 16 Wall (U. S.) 36, 21 L. Ed. 394.

"1 'Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"While the Supreme Court of the United States had before it the question of race discrimination under the Fourteenth Amendment in the *Slaughter-House cases*, it appears that it was not until the case of *Strauder v. West Virginia* that the court had occasion to determine that race discrimination in jury organization

was prohibited by the Fourteenth Amendment. In the latter case a statute of West Virginia limited jury service to white male persons. This statute was held as discriminatory against members of the Negro race and, therefore, violative of equal protection.

"Following the Strauder case, the question of race discrimination in the selection of juries was before the court upon several occasions.

"In *Carter v. Texas*, 177 U.S. 442, 44 L. Ed. 839, 20 S. Ct. 687, the rule was stated as follows:

" 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664; *Neal v. Delaware*, 103 U. S. 370, 397, 26 L. Ed. 567, 574; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075, 16 S. Ct. 904.'

"The rule, as thus established, applies equally to petit jury selection.

"For a time, and until the case of *Norris v. Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, establishment of discrimination rested upon facts showing actual or express discrimination against members of the Negro race. In the *Norris* case, however, the so-called rule of exclusion was announced in the following language, viz.

" 'We think that the evidence that for a generation or longer no Negro had been called

for service on any jury in Jackson County, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of Negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of Negroes established the discrimination which the Constitution forbids.'

"In succeeding cases this rule of exclusion was followed or adverted to in the cases of *Smith v. Texas*, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164; *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159; and *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

"The effect of the rule of exclusion is to furnish means by which proof of discrimination may be accomplished.

"In the *Akins* case, the idea of proportional representation of races on a jury as a constitutional requisite was rejected. The basis of such rejection was pointed out in *Cassell v. Texas*, 339 U. S. 282, 70 S. Ct. 629; 94 L. Ed. 839, as follows:

" 'We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously, the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation.'

"The conclusion of race discrimination expressed in the *Cassell* case, which is one of the latest expressions by the Supreme Court of the

United States upon the subject, appears not to have been based upon the so-called rule of exclusion above mentioned but upon the conclusion that the jury commissioners appointed to select the list of names from which the grand jury was to be selected did not 'familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination.'

"In addition to that conclusion, the Cassell case also announced the rule that discrimination may be shown by inclusion as well as exclusion, on account of race, in jury selection.

"To our minds, it is conclusive that, in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class.

"We said in *Sanchez v. State*, 243 S. W. 2d 700, that 'Mexican people are not a separate race but are white people of Spanish descent.' In contemplation of the Fourteenth Amendment, Mexicans are therefore members of and within the classification of the white race, as distinguished from members of the Negro race. In so far as we are advised, no member of the Mexican nationality challenges that statement. Appellant does not here do so.

"It is apparent, therefore, that appellant seeks to have this court recognize and classify Mexicans as a special class within the white race and to recognize that special class as entitled to special privileges in the organization of grand and petit juries in this state.

"To so hold would constitute a violation of equal protection, because it would be extending to members of a class special privileges not accorded to all others of that class similarly situated. Moreover, it must be remembered that no man, or set of men, has the right to require that a member of his race be a member of the grand jury that indicts him or of the petit jury that tries him. All that the Constitution, State or Federal, guarantees in that connection is that in the organization of such juries he be not discriminated against by reason of his race or color. *Thomas v. Texas*, 212 U. S. 278, 26 S. Ct. 338, 53 L. Ed. 512; *Martin v. Texas*, 200 U. S. 316, 26 S. Ct. 66, 50 L. Ed. 497; *Carter v. Texas*, 177 U. S. 442, 20 S. Ct. 686, 44 L. Ed. 839.

"To say that members of the various nationalities and groups composing the white race must be represented upon grand and petit juries would destroy our jury system, for it would be impossible to meet such requirement. Such, also, would destroy the rule above stated and would be tantamount to authorizing an accused to demand that a member of his nationality be upon the jury that indicts and tries him. In addition, to so hold would write into the equal protection clause proportional representation not only of races but of nationalities, which the Supreme Court of the United States has expressly rejected.

"Mexicans are white people, and are entitled at the hands of the state to all the rights, privileges, and immunities guaranteed under the Fourteenth Amendment. So long as they are so treated, the guarantee of equal protection has been accorded to them.

"The grand jury that indicted appellant and the petit jury that tried him being composed of

members of his race, it cannot be said, in the absence of proof of actual discrimination, that appellant has been discriminated against in the organization of such juries and thereby denied equal protection of the laws.

"The judgment is affirmed.

"Davidson, Judge

"(Delivered June 18, 1952)

"Opinion approved by the court."

SPECIAL POINTS

Respondent herein specially points out that *Petitioner Pete Hernandez* with malice aforethought murdered *Joe Espinosa* (Indictment, R. 1) which shows *both the murderer and the murdered* to be of the Latin American origin as per names and that no denial of equal protection of law is shown by the record in this case, as might be otherwise vaguely inferred if the victim had been of some other national origin.

Reference to "Mexican or Latin American name" in stipulations is invalid as proof of absence of persons of Mexican or Latin American blood since it is common knowledge that many persons in the area of Texas including Jackson County, Texas, who have names other than Mexican or Latin American names are nevertheless of Mexican or Latin American blood.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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